

No. 346

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

ARCHIE SHELP AND GEORGE
CLEVELAND,

Plaintiffs in Error,

vs.

THE UNITED STATES OF
AMERICA,

Defendant in Error.

Brief of Defendant in Error.

In Error to the United States District Court for
the District of Alaska.

FILED
FEB 8 1937

*In the United States Circuit Court of Appeals for the Ninth
Circuit.*

ARCHIE SHELP AND GEORGE
CLEVELAND,

Plaintiffs in error,

vs.

THE UNITED STATES OF AM-
ERICA,

Defendants in error.

Brief of Defendant in Error.

STATEMENT OF THE CASE.

About the 18th day of August, 1894, the plaintiffs here arrived at Chilkoot, Alaska, in a small boat, having on board whisky for the purpose of selling to the Indians, or native Alaskans, who lived in that village. Chilkoot is an Indian village situated in Southeastern Alaska. They anchored their boat off shore, and the plaintiff Cleveland waved his hat and attracted the attention of one of the natives by the name of Dennis, and at the same time went to a small keg containing whisky, and drew a tin cup full from it and drank it, so that Dennis could see and know that they had whisky on board their boat. Being unable to resist the temptation to obtain whisky, as all Alaskan natives are addicted to its use

Dennis immediately went off to the boat. The plaintiffs immediately drew more whisky out of the keg and gave it to Dennis to drink, and told him to go and tell all the people in the village that they (the plaintiffs) had plenty of whisky on board their boat. This Dennis did, and the result was that twelve of the head men of that village went in their canoe from the village to the plaintiffs' boat, and purchased from them all the whisky that they could with their limited means. Dennis himself bought two bottles and paid two dollars a bottle.

Dennis testifies to the above state of facts, as does also Goonawk, Dick, Samdoo, Kassto, Dave and Jim, natives of this village, who purchased whisky of the defendants at this time.

POINTS OF LAW.

The crime of which these appellants are charged is a misdemeanor.

♦ FIRST.

In regard to plaintiffs' first assignment of error, it is submitted that it was proper for the court to overrule their objection to testimony being given by the witnesses Goonawk, Dick, Samdoo, Kassto, and Dick, for the reason that it was not necessary that their names appear upon the indictment, as only those names appear upon the indictment who appeared before the grand jury.

See General Laws of Oregon, page 348, paragraph 61.

Nor was it necessary that plaintiffs or their attorneys be furnished with a list of the names of the wit-

nesses, as this is only necessary in treason and other capital offenses.

See Revised Statutes of the United States, sec. 1033.

Nor was it necessary for the Government to obtain an order of court allowing it to swear other witnesses than the names of those who appeared upon the indictment.

SECOND.

In regard to plaintiffs' second assignment of error it is submitted that it was proper for the court to deny their motion for nonsuit as the prohibitory liquor law of Alaska is specific, and absolutely prohibits the sale of intoxicating drinks in Alaska. Liquor can be sold of course under the Governor's permit, for mechanical, and scientific purposes, but this is an exception; and if a person sells liquor thus inhibited, he must show that he sells for said purposes and has a right to so sell.

THIRD.

In regard to plaintiffs' third assignment of error, it is submitted that it was proper for the court to overrule their motion in arrest of judgment, as the indictment charged facts sufficient to constitute the crime it purported to allege.

FOURTH.

In regard to plaintiffs' fourth assignment of error, it is submitted that there was no error committed in the court's instruction to the jury.

FIFTH.

In regard to plaintiffs' fifth assignment of error, it is submitted that it was proper for the court to deny their motion to set aside the verdict and grant a new trial, as there was no abuse of discretion on the part of the court; neither was there any misconduct on the part of the United States attorney in his argument to the jury; no objection or exception thereto having been made or taken at the time.

Bland v. Gaither (Ky.), 11 S. W. 423; 10 Ky.
L. Rep. 1033.

State v. Taylor (Mo.), 11 S. W. 570.

State v. Carter (Mo.), 11 S. W. 624.

Gray v. Chicago M. & St. P. R. Co., 75 Iowa,
100; 39 N. W. 213.

As to the other reasons mentioned in said assignment of error it is not necessary to seriously consider them.

There is one other matter that I desire to call the court's attention to, although it is not in plaintiffs' assignment of errors. It will be noticed that the record discloses the fact that one of the plaintiffs was not arraigned and did not plead, but it will be observed further that the record discloses the fact that he was present at the trial and went to trial, and even went upon the witness stand in his own behalf. Therefore, it is contended, he is not entitled, under the federal statutes, to a new trial because of the failure of the record to show arraignment and plea, for the reason that the irregularity was "a de-

fect or imperfection in matter of form only," within the meaning of section 1025 U. S. Rev. Stats., and did not tend to his prejudice.

United States v. Molloy, 31 Federal Reporter, 19.

I therefore respectfully submit that the judgment of the United States District Court for the district of Alaska should be affirmed.

BURTON E. BENNETT,

United States Attorney.

